

RD AN No. 3740 (1940-G)  
April 10, 2002

**TO:** Rural Development State Directors,  
Rural Development Managers, and  
Community Development Managers

**ATTN:** State Environmental Coordinators, and  
Program Directors

**FROM:** Arthur A. Garcia                   *(Signed by Arthur A. Garcia)*  
Administrator  
Rural Housing Service

John Rosso                               *(Signed by John Rosso)*  
Administrator  
Rural Business-Cooperative Service

**SUBJECT:** 36 C.F.R. part 800  
National Historic Preservation Act  
Revised Section 106 Regulations

**PURPOSE/INTENDED OUTCOME:**

The purpose of this Administrative Notice (AN) is to clarify that our current environmental regulation, RD Instruction 1940-G, encompasses compliance with the revised regulation for implementing the National Historic Preservation Act (NHPA), codified at 36 C.F.R. part 800.

RD Instruction 1901-F also provides direction for compliance with historic preservation requirements, however, it is out-of-date. The requirements of RD Instruction 1940-G, sections 1940.304(d) and 1940.305(g), and the revised NHPA regulations at 36 C.F.R. part 800 take precedence.

EXPIRATION DATE:  
April 30, 2003

FILING INSTRUCTIONS:  
Preceding RD Instruction 1940-G

## **BACKGROUND:**

On December 12, 2000, beginning on page 77698 of volume 65 of the Federal Register (65 Fed. Reg. 77698), the Advisory Council on Historic Preservation (ACHP) issued a revised regulation to implement the 1992 amendments to the NHPA and to streamline the review process under section 106 of NHPA. This regulation, which is binding on all federal agencies, became effective January 11, 2001. It revises and replaces the NHPA regulation which was published in the Federal Register on May 18, 1999, and became effective June 17, 1999.

## **COMPARISON WITH PREVIOUS AN:**

This AN replaces, with minor clarifications, AN No. 3665 (1940-G), dated May 24, 2001, which expires May 31, 2002.

## **IMPLEMENTATION RESPONSIBILITIES:**

The new NHPA regulation encourages federal agencies to integrate section 106 reviews with the environmental reviews completed under the National Environmental Policy Act. Since we already do this, the impact on the Rural Housing Service and the Rural Business-Cooperative Service is minimized. Nevertheless, there are changes which require our particular attention. Two of the most important are:

1. The revised regulation places considerable emphasis on Federal agencies consulting with a wide range of parties throughout the section 106 process, including the State Historic Preservation Office (SHPO), the Tribal Historic Preservation Office (THPO) or other appropriate representative of Indian Tribes and Native Hawaiian organizations, local governments, and additional interested individuals or organizations.

It is very important to understand that Federal agencies are now responsible for making a *reasonable and good faith effort* to identify and consult with Indian Tribes and Native Hawaiian organizations that might attach religious or cultural significance to properties located *off tribal lands*, which might be affected by agency activities. Failure to make this effort can lead to a foreclosure notice from either SHPO or ACHP, meaning that the agency has failed to comply with section 106 and has thus violated federal law. This leaves the agency vulnerable to citizen litigation.

State Environmental Coordinators (SECs) are expected to work with their respective SHPOs or THPOs to develop a list of appropriate Indian Tribes and Native Hawaiian organizations for contact by field staff preparing environmental documents. SECs are also expected to work directly with representatives of Indian Tribes and Native Hawaiian organizations in an

effort to give focus to the consultation efforts and to minimize unnecessary consultations.

2. Public notice of the potential for adverse impacts to historic property listed or eligible for listing on the National Register of Historic Places is now explicitly required. This public notice is in addition to the consultations referred to in the paragraph #1 above. The public notice procedures used for floodplains and wetlands under RD Instruction 1940-G must now be used, when appropriate, for proposed actions requiring a Class I or Class II environmental assessment under sections 1940.311 and 1940.312.

It is recommended that language, similar to the following, be added to the preliminary notice: “ The agency is seeking the public’s opinion on the presence of any historic property which might be adversely affected by this proposed action, and on ways to avoid or resolve such effects.” If specific historic property has already been identified, the language in the preliminary notice should be modified accordingly.

For actions listed as Categorical Exclusions in RD Instruction 1940-G, section 1940.310, the agency will require consultation with SHPO or THPO, as appropriate, only when the agency believes that the proposed action has the potential to impact property either listed or potentially eligible for listing on the National Register of Historic Places (unless the State office has a programmatic agreement with the SHPO which states otherwise).

The Nationwide Programmatic Agreement for the Housing Preservation Grant Program (RD Instruction 2000-FF, Exhibit A) remains in effect. Any reference therein to 36 C.F.R. part 800 refers to the revised regulation.

SECs will take the lead in providing the necessary guidance and direction for the revised regulations and in working with SHPOs and THPOs. Field employees are encouraged to work closely with the SEC to implement the revised regulation. Additional guidance will be provided as it becomes available. ACHP maintains an excellent web site with considerable explanatory information at [www.achp.gov](http://www.achp.gov). Questions or comments should be directed to Sue Wieferich, Federal Preservation Officer for RHS and RBS, Program Support Staff, at (202) 720-9647 or [sue.wieferich@usda.gov](mailto:sue.wieferich@usda.gov).